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No. 84-468

In the Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, ET AL.,
PETITIONERS
v.
CLEBURNE LIVING CENTER, INC., ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Motion for Leave to File a Brief Amici Curiae and Amici Curiae Brief of The National Association for Rights Protection and Advocacy; The Normalization Safeguards Project; The Foundation for Dignity; The Brums Foundation; and the Plaintiffs in: Brewster v. Dukakis (D. Mass.); Connecticut Association for Retarded Citizens v. Thorne (D. Conn.); E.H. v. Martin (W.Va. Sup. Ct.); Garrity v. Sununu (D.N.H.); Gustafson v. Mahoney (D. Mass.); Halderman v. Pennhurst (E.D. Pa.); Isomone v. Garrahy (D.R.I.); Lelsz v. Kavanagh (E.D. Tex.); Mental Health Association of Los Angeles v. Deukmejian (Cal. Super. Ct.); Massachusetts Association for Retarded Citizens v. Dukakis (D. Mass.); Michigan Association for Retarded Citizens v. Smith (E.D. Mich.); Medley v. Ginsberg (S.D. W.Va.).

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Pursuant to Sup. Ct. R. 36.3, Amici respectfully request the Court for leave to file a brief *amici curiae*. Amici support the position of the respondents on the questions presented but also argue that the case is moot, that state law controls, and therefore that the writ should be dismissed as improvidently granted.

Petitioners have not responded to a request for consent. See Letters to Parties' Counsel, Appendix 1. Respondents have indicated their objection to this brief.

Amici are people with retardation and related handicaps, as well as professional, advocacy, and charitable organizations, who have a vital and direct interest in the questions before the Court. Amici include tens of thousands of citizens who were born with a mental disability or who have otherwise been labelled as mentally handicapped. These individuals and the organizations which represent them are all plaintiffs in the following pending cases brought to protect their freedom to move into normal community homes in integrated neighborhoods: *Brewster* v. *Dukakis*, C.A. 76-4423-F (D. Mass.); *Connecticut Association for Retarded Citizens* v. *Thorne*, C.A. 1478-653 (D. Conn.); *E.H.* v. *Martin*, C.A. Misc. 81-584 (W. Va. Sup. Ct.); *Garrity* v. *Sununu*, C.A. 78-116 (D.N.H.); *Gustafson* v. *Mahoney*, C.A. 78-3040-MC (D. Mass.); *Halderman* v. *Pennhurst*, C.A. 74-1345 (E.D. Pa.); *Isomone* v. *Garrahy*, C.A. 77-727 (D. R.I.); *Lelsz* v. *Kavanagh*, C.A. S-74-95 (E.D. Tex.); *Mental Health Association of Los Angeles* v. *Deukmejian*, C.A. 000-540 (Cal. Super. Ct.); *Massachusetts Association for Retarded Citizens* v. *Dukakis*, C.A. 75-5023-T and 75-5210-T (D. Mass.); *Michigan Association for Retarded Citizens* v. *Smith*, C.A. 78-70384 (E.D. Mich.); *Medley* v. *Ginsberg*, C.A. 78-2099 CH (S.D. W.Va.).

Amici also include professional and advocacy organizations dedicated to assisting people with retardation. The Normalization Safeguards Project is a training and technical assistance organization which was established in 1980 to disseminate professional opinion on the design, management and integration of community services for people with retardation and other handicaps. The National Association for Rights Protec-

tion and Advocacy (NARPA) is the only national organization which addresses both mental health and retardation issues and which includes in its membership a broad spectrum of state departmental administrators, specialists in treatment and habilitation, professional advocates, and former and present recipients of mental health and retardation services.

Finally Amici include two foundations. The Foundation for Dignity is a charitable organization established in Pennsylvania and devoted to public and professional education regarding the needs and rights of people with disabilities and other people who have been devalued or disadvantaged as a class. The Brums Foundation, a Texas charity, is especially interested in this case since its sole purpose is to protect the constitutional and other rights of institutionalized people with retardation, especially in its home state.

The daily lives and work of the Amici, their members and constituents, will be affected by any decision in this case on the merits. Amici are particularly qualified to inform the Court of the preference of retardation professionals for community living and the concerns of people with retardation who are being excluded from local neighborhoods. Because of their experience and perspective, Amici are in a unique position to present and analyze the professional literature and research which form the foundation for the expert judgment favoring community living. Neither party before the Court has undertaken such a review nor discussed the professional consensus which forms the basis for Texas' decision to fund community homes such as that proposed by Cleburne Living Center. This consensus provides the context for resolving the merits of this case and for determining the relevance, for equal protection analysis, of the unfortunate history of segregating people with retardation in institutions.

Amici also discuss the question of whether the writ of certiorari should be dismissed as improvidently granted because of issues of mootness and preemption of state law. Neither of these issues are briefed by the parties, even though they each provide a prudential ground for avoiding the decision of a complex constitutional question.

Respectfully submitted,

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January 23, 1985

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December 26, 1984

Earl Luna, Esq.
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Dear Mr. Luna:

We are currently drafting an amicus brief to the United States Supreme Court which we expect to file in *City of Cleburne v. Cleburne Living Center*. The brief is being written on behalf of the National Association for Rights Protection and Advocacy, plaintiff class representatives in a number of deinstitutionalization cases throughout the country, the Foundation for Dignity, and possibly other organizations.

We are writing pursuant to U.S. Supreme Court R. 36.2 to request your consent to the submission of this brief. We would appreciate hearing from you as soon as possible in order to determine the appropriate way to proceed with this matter. Thank you for your attention.

Sincerely,

/s/ _____
Steven J. Schwartz
Attorney

SJS/sad
cc: David Ferleger

CENTER FOR PUBLIC REPRESENTATION

Mental Patients Advocacy Project
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December 26, 1984

Diane Shisk, Esq.
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Dear Ms. Shisk:

We are currently drafting an amicus brief to the United States Supreme Court which we expect to file in *City of Cleburne v. Cleburne Living Center*. The brief is being written on behalf of the National Association for Rights Protection and Advocacy, plaintiff class representatives in a number of deinstitutionalization cases throughout the country, the Foundation for Dignity, and possibly other organizations.

We are writing pursuant to U.S. Supreme Court R. 36.2 to request your consent to the submission of this brief. We would appreciate hearing from you as soon as possible in order to determine the appropriate way to proceed with this matter. Thank you for your attention.

Sincerely,

/s/ _____
Steven J. Schwartz
Attorney

SJS/sad
cc: David Ferleger

Table of Contents

Interest of amici 1

Summary of argument 2

Argument 4

I. Certiorari was improvidently granted because a) the case is moot and b) state law prevents the city's exclusion of the community home 4

A. This case is moot because the proposed group home does not comply with current Texas law governing the size of ICF-MR facilities 4

B. The Cleburne Zoning Ordinance is contrary to the state's policy of promoting community services for people with retardation 6

II. This Court's decision should defer to the current professional judgment to provide individualized habilitation with a preference for small community settings rather than large institutions 7

A. People with retardation make good neighbors 7

1. The public welfare: benefits to people with retardation 7

2. The public welfare: benefits to families and neighbors 10

3. The public welfare: the public treasury 14

4. The public welfare: state policy 16

B. People with retardation in large institutions 18

III. People with retardation, like other minorities before them, cannot be excluded from our neighborhoods nor denied equal opportunities in our communities 20

Conclusion 23

Appendix A 1a

Table of Authorities Cited

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Board of License Commissioners v. Pastore, 53 U.S.L.W. 4057 (Jan. 8, 1985) 4

Brewster v. Dukakis, C.A. 76-4423-7 (D. Mass.) 1n

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Garrity v. Sununu, C.A. 78-116 (D.N.H.) 1n

Gustafson v. Mahoney, C.A. 78-3040-MC (D. Mass.) 1n

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Kremens v. Bartley, 431 U.S. 119 (1977) 4

Lelsz v. Kavanagh, C.A. S-74-95 (E.D. Tex.) 1n, 6

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29 U.S.C., § 794 16

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Article 114 16

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Interest of Amici

Amici* are people with retardation and related handicaps,[1] as well as professional,[2] advocacy,[3] and charitable organizations,[4] who have a vital and direct interest in the questions be-

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* A motion for leave to file a brief amicus curiae has been filed in the absence of written consent from both parties.

[1] The plaintiffs in the following pending cases are all current or prospective residents of state institutions or community homes in their respective states: *Brewster* v. *Dukakis*, C.A. 76-4423-F (D. Mass.); *Connecticut Association for Retarded Citizens* v. *Thorne*, C.A. 1478-653 (D. Conn.); *E.H.* v. *Martin*, C.A. Misc. 81-584 (W.Va. Sup. Ct.); *Garrity* v. *Sununu*, C.A. 78-116 (D.N.H.); *Gustafson* v. *Mahoney*, C.A. 78-3040-MC (D. Mass.); *Halderman* v. *Pennhurst*, C.A. 74-1345 (E.D. Pa.); *Isomone* v. *Garrahy*, C.A. 77-727 (D.R.I.); *Lelsz* v. *Kavanagh*, C.A. S-74-95 (E.D. Tex.); *Mental Health Association of Los Angeles* v. *Deukmejian*, C.A. 000-540 (Cal. Super. Ct.); *Massachusetts Association for Retarded Citizens* v. *Dukakis*, C.A. 75-5023-T and 75-5210-T (D. Mass.); *Michigan Association for Retarded Citizens* v. *Smith*, C.A. 78-70384 (E.D. Mich.); *Medley* v. *Ginsberg*, C.A. 78-2099 CH (S.D. W.Va.).

[2] The Normalization Safeguards Project is a training and technical assistance organization which was established in 1980 to disseminate professional opinion on the design, management and integration of community services for people with retardation and other handicaps. The Project has assisted state and local officials, civic organizations, and private agencies which provide community services in developing new homes in local neighborhoods for retarded citizens.

[3] The National Association for Rights Protection and Advocacy (NARPA) is the only national organization which addresses both mental health and retardation issues and which includes in its membership a broad spectrum of state departmental administrators, specialists in treatment and habilitation, professional advocates, and former and present recipients of mental health and retardation services. NARPA was formed in 1979 as a result of coordinating efforts of the National Institute of Mental Health. Among NARPA's hundreds of members are people who design, live and work in community and institutional services for people with retardation.

[4] The Foundation for Dignity is a charitable organization established in Pennsylvania and devoted to public and professional education regarding the needs and rights of people with disabilities and other people who have been devalued or disadvantaged as a class.

The Brums Foundation, a Texas charity, is especially interested in this case since its sole purpose is to protect the constitutional and other rights of institu-

fore the Court. The daily lives and work of the Amici, their members and constituents, will be affected by any decision in this case on the merits.

Amici are particularly qualified to inform the Court of the fundamental and contextual issues in this case, including the preference of retardation professionals for community living and the concerns of people with retardation who are being excluded from local neighborhoods. Amici and their members include state mental health and retardation officials, administrators of facilities for people with handicaps, academic and clinical researchers and therapeutic practitioners in the field, advocates employed or appointed by state agencies, charitable foundations devoted to educational and public service with regard to disabilities, and, perhaps with the greatest stake in the outcome of this case, people with retardation themselves, whose right to live in the community of their choice is before the Court.

Summary of Argument

Although this case raises important issues, the Court ought to dismiss certiorari for two reasons. First, the case is moot. After the date on which the respondent, Cleburne Living Center, Inc. (CLC) filed its application for certification of a thirteen bed residential program with the state licensing agency, the Texas Department of Human Resources' regulations were modified to limit such residences to a maximum of six beds. These regulations make no provision for grandfathering prior

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tionalized people with retardation, especially in its home state. As a result of the drowning death of Mark Jones, an eighteen year old resident of the Fort Worth State School, his family established Brums to help ensure that people with retardation in Texas institutions are provided the opportunity for full and dignified lives.

applications or otherwise waiving this limit. CLC's application has never been and could not now be approved under the new regulation.

Second, the ordinance is in conflict with Texas law which incorporates a clear mandate to encourage the development, on a nondiscriminatory basis, of new community homes for people with retardation. The City can hardly claim to be advancing State interests by promulgating a zoning ordinance which erects substantial impediments to the establishment of such homes.

If the Court chooses to address the constitutional question, it should adopt a standard which reflects appropriate deference to the professional judgment of retardation experts who clearly prefer community living over needless institutional confinement. This judgment has been adopted by Texas and most, if not all, of the states and it furthers the public welfare through a) improvement of the quality of life for people with retardation, b) advancement of the interests of families, neighbors, and local communities, c) protection of the public fisc, and d) furtherance of a number of long-standing state policies. In addition, this professional and political judgment avoids the harms of life-long institutionalization and is currently being widely implemented by many states.

People with retardation, like other disfavored groups before them, have been subjected to prejudice, exclusion and unequal treatment solely by reason of characteristics determined at birth. Although these defining traits may in some cases require certain accommodations to people on an *individual* basis, the history of hostility and discrimination has been directed at retarded people as a *class*, by reason of their membership in this class. The Fourteenth Amendment has never required that individual differences between people be ignored in governmental decision-making; it has required, however, that such decisions not be based on status and other class-wide charac-

teristics, especially those which are founded on false and derogatory stereotypes. As with other insular minorities, the pattern of discrimination often focuses upon excluding people with retardation from residential neighborhoods or the imposition of burdensome procedures which unduly restrict their freedom to leave confining institutions and to live in the communities of their choice. If the Court reaches the merits, the judgment below should be affirmed.

Argument

I. Certiorari Was Improvidently Granted Because A) the Case is Moot and B) State Law Prevents the City's Exclusion of the Community Home.

A. *This Case is Moot Because the Proposed Group Home Does Not Comply with Current Texas Law Governing the Size of ICF-MR Facilities.*

Under present Texas law, the proposed group home would violate state regulations. The decisions below were based on prior law. This Court must review the record below in light of state law as it stands today, not as it stood at the time of trial. *Kremens* v. *Bartley*, 431 U.S. 119 (1977).

The changed facts here have the identical effect as those in *Board of License Commissioners* v. *Pastore*, 53 U.S.L.W. 4057 (Jan. 8, 1985), in which "no decision on the merits by this Court can now have an affect on the . . . license," and "[T]he case is therefore moot." *Id.* at 4058.

At the time Cleburne Living Center filed its initial application for the home and at the time of trial on April 26 through April 28, 1983, the licensing rules of the Texas Department of Human Resources (TDHR) required, as a condition of certification, that certain intermediate care facilities for people with retardation be limited to a maximum of *fifteen* beds per

facility. On May 1, 1982, several days post-trial but before any certification was granted, new regulations took effect which limited the number of beds to *six* per facility. 40 T. A. C. 27.203. The new regulation reads:

> (a) Effective May 1, 1982, all applications (I, V, VI) for participation in the ICF-MR Program . . . must meet the following requirements.
>
> (1) Requested certification will be limited to a maximum of six beds per facility, whether the facility is currently certified or whether the request is for certification for a new facility.

J.A. 79-80.

The lower courts made no finding that the size limit in the former regulation was applicable to this CLC house. Rather, the court merely found that a CLC official "claimed" that the "new regulation does not apply" to the facility. Finding of Fact No. 38; J.A. 96.

CLC based its claim on a letter from the Commissioner of TDHR to counsel for Respondents. J.A. 37, 77. The letter, dated November 4, 1981, did not address the applicability of the "new" six-bed regulation. It could not have addressed this limit since the regulation was not in existence at that time and, in fact, was not issued until December 22, 1981. Def. Ex. 10; J.A. 78-79. The procedural extension of time set forth in the November letter and relied on by the CLC official had nothing to do with waiver of a substantive certification requirement.

The six-bed limit regulation applies to "*all applications,*" J.A. 79, and includes no exceptions or grandfathering provision. The record does not reflect any contrary practice or interpretation by TDHR.

The state had not certified the home at the time the City Council considered a special use permit for the thirteen bed

home. Finding of Fact No. 37; J.A. 96. Texas law now prohibits certification of intermediate care facilities such as that reviewed by the City Council. Issues arising from the City Council's consideration of a special use permit are moot because the application at issue cannot result in certification of a facility for people with retardation.

B. *The Cleburne Zoning Ordinance is Contrary to the State's Policy of Promoting Community Services for People with Retardation.*

The Texas Zoning Enabling Act gives the City of Cleburne the authority to promulgate zoning regulations which serve legitimate *state interests*. Tex. Rev. Civ. Stat. 1011A. As the State itself explains in its amicus brief, Texas law prevents the exclusion of community homes from Cleburne. The State of Texas has an explicit policy of promoting the development of community services for people with retardation. Tex. Vernon's Ann. Civ. St. Art. 5547-300 (Mentally Retarded Persons Act); *Lelsz* v. *Kavanagh*, No. S-74-95-CA (E.D. Tex., July 21, 1983 Consent Decree). The zoning ordinance severely restricts the development of community services. Thus, the City of Cleburne can hardly claim that the zoning ordinance promotes legitimate state interests.

Because the validity of the ordinance turns on the extent to which the City exercised its zoning authority under state law, and because this Court need not consider the state law questions, a proper respect for the State's constitutional policy-making authority suggests that certiorari has been improvidently granted.

II. This Court's Decision Should Defer to the Current Professional Judgment to Provide Individualized Habilitation with a Preference for Small Community Settings Rather than Large Institutions.

Should the Court reach the merits of the Equal Protection issues, it should do so in a way that defers to the professional consensus which has emerged in Texas and throughout the nation to provide people with retardation with individualized habilitation, preferably in small community settings. Amici strongly urge the Court to ensure that its decision in this case does not interfere with the states' policy-making and experimentation in this field.

The State of Texas has undertaken by statute and court decision to provide community services for people with retardation, favoring small community settings over large institutions. Sec. I.B., *supra*. Near the City of Cleburne are several large state retardation institutions and these, as well as the local community, would provide the residents for the CLC home. J.A. 33-34.

As discussed below, people with retardation are already our neighbors and contribute significantly to our communities. Establishing new homes for them is not a novel experiment but rather a long-accepted professionally designed approach to improving the public welfare in several ways: it provides a) benefits to people with retardation, b) benefits to families and neighbors, c) protection of the public fisc, and d) implementation of legislative policy.

A. *People With Retardation Make Good Neighbors.*

1. The Public Welfare: Benefits to People with Retardation.

Inherent in the consensus among mental retardation professionals are principles of normalization, least restrictive alterna-

tive and the developmental model of programming.[5] All three concepts are in conflict with institutionalization, which isolates people from the rhythms and opportunities of an integrated community life.[6]

The neglect, abuse and regression typically found in large inadequate institutions have not followed their former residents into the community. Small community residential programs generally provide residents a more appropriate and less restrictive environment in which to develop personal, social and vocational skills.

Community residential services assume a variety of forms ranging from foster families to residential settings with twenty-four hour per day staff.[7] If the person is under twenty-one years of age, he or she usually attends a public school program during the day. If the person is an adult, he or she participates in competitive work, a vocational training program, or other professionally developed day program.[8]

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[5] Bruininks, Thurlow, Thurman and Fiorelli, *Deinstitutionalization and Community Services* in 11 MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES 55 (J. Wortis ed. 1980).

[6] For the President's Committee on Mental Retardation, Bengt Nirje summarized some of the reasons institutions fail at normalization:

> Large institutions and the conditions we can observe in their back wards can never offer facilities of the kind and quality that are essential. In the large machine-like atmosphere, the normal rhythm of daily routines of occupation, leisure, and personal life is emasculated to surrogate activities, not integrated with a meaningful personal existence. The normal rhythm of the year is mostly dwarfed through the experience of monotonous confinement. The development of individuality is helplessly mutilated and crushed in a life in herds.

Nirje, *The Normalization Principle and Its Human Management Implications*, in President's Committee on Mental Retardation, *Changing Patterns in Residential Services for the Mentally Retarded* 179, 186-187 (R. Kugel & W. Wolfensberger eds. 1969).

[7] Bruininks, Thurlow, Thurman and Fiorelli, *supra* n.5.

[8] Kenefick, *Court Decisions: The Impact of Litigation*, in 12 MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES 20, 45 (J. Wortis ed. 1981).

The size of community homes vary. Smaller residences promote a more normal, habilitative, home-like environment and are not "mini-institutions." In Pennsylvania, for example, community residences called Community Living Arrangements are designed to serve three or fewer individuals and have twenty-four hour staff coverage provided by either shift or live-in staff. Each resident has a written habilitation plan and attends one of several types of day programs.[9] Texas group homes house six or fewer people, in a program subject to regulation. J.A. 78-81.

It is not the existence or degree of retardation that limits people's ability to live in the community. Success of placement depends "primarily on the quality of the community support system rather than characteristics of individuals themselves."[10] Movement to family-scale community homes results in substantial increases in level of functioning and generally positive behavioral change for people with all levels of retardation. People who leave institutions[11] for the community quickly make significant adaptive behavior gains relative to those who remain institutionalized.[12]

Since 1978, the United States Department of Health and Human Services has funded an unprecedented, comprehensive

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[9] Temple University and Human Services Research Institute, *Pennhurst Longitudinal Study, 1979 to 1983, Fourth Year Summary* (Contract Report to U.S. Department of Health and Human Services 1983) (hereafter, Temple University/HHS Study).

[10] Heal, Sigelman and Switzky, *Research on Community Residential Alternatives for the Mentally Retarded* in NORMALIZATION, SOCIAL INTEGRATION AND COMMUNITY SERVICES at 251 (R. Flynn and K. Nitsch eds. 1980).

[11] Most people who leave are returned to the community from which they entered the institution.

[12] *See* Craig and McCarver, *Community Placement and Adjustment of Deinstitutionalized Clients: Issues and Findings* in 12 INTERNATIONAL REVIEW OF RESEARCH IN MENTAL RETARDATION 95 (N. Ellis and N. Bray eds. 1984).

study of the movement of hundreds of people from a large institution to community homes of two to three residents. The results confirm that severely and profoundly retarded individuals benefit at least as much, and probably more, from community living than people with less extensive retardation. The people who had left institutions were found to have made more gains in terms of independent functioning and developmental growth than their institutionalized "twins." Community residents received more than ten hours per day of supportive, developmentally-oriented and structured service, as compared with an average of six hours a day when they were institutionalized.[13]

2. The Public Welfare: Benefits to Families and Neighbors.

Today and for the past hundred years, the national and state experience in returning people with retardation to their home communities has generally resulted in support of community living for people with retardation. However, because many Americans have become accustomed to segregating people with retardation in institutions, the increase in community living opportunities may bring initially hostile reactions from those who prefer to have the retarded "out of sight, out of mind."

Community homes are not new. They are neither experimental nor novel. The training of people with retardation — intensively and professionally — is based on the use of community day programs and family-scale community homes which are as old as or older than retardation institutions in the United States. R. Scheerenberger, *A History of Mental Retardation* (1983); Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 Rutgers L.J. 595, 614-616 (1983).

The "colony" system was one alternative to institutionalization which was developed contemporaneously with the growth

[13] Temple University/HHS Study, *supra*, note 9.

of large public institutions for people with retardation. Colonies were created to "relieve the parent institution of overcrowded conditions, to provide a less restricted and more congenial environment for patients fit for colony life, and to utilize their labor profitably." [14] They were established to provide "practical training for the patients under conditions as far as possible approaching the normal." [15] Located in established residential areas and in normal homes, colonies were a stable residential service for people at all levels of retardation.

In the late 1920's, neighborhood acceptance was achieved regularly and with little difficulty:

> So far as can be ascertained from careful inquiry, all of the girls' colonies are in good standing with their communities. They occupy good houses in the better residential sections. There are usually close neighborhoods. If at first the rumor that a house is to be occupied for such a purpose causes some misgivings in the neighborhood, that feeling is quickly dispelled when the colony begins to operate and it is seen how quiet and orderly the household proves to be.[16]

In recent years, some neighborhoods have expressed hostility to new community homes. However, opposition tends to decline once a residential facility has opened.[17] In one 1976 analysis, 89%

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[14] A. Deutsch, THE MENTALLY ILL IN AMERICA 381 (2d ed. 1949).

[15] *Id.*

[16] S. Davies, SOCIAL CONTROL OF THE MENTALLY DEFICIENT 283-284 (1930).

[17] More than ten years of study have produced consistent data. *See* Lauber and Bangs, *Zoning for Family Group Care Facilities* (Planning Advisory Group Rep. No. 300) (Chicago: American Society of Planning Officials (1974)); Mamula and Newman, *Community Placement of the Mentally Retarded: A Handbook for Community Agencies and Social Work Practitioners* (1973); Okolo and Guskin, *Community Attitudes Toward Community Placement of*

of the programs studied claimed that opposition had decreased, pointing primarily to the acceptable behavior of residents.[18] Careproviders' records in a study in Fresno, California indicated that 96% of the residents had no recorded behavior difficulties in their neighborhoods.[19]

Family opposition to community homes for institutionalized relatives also decreases over time. A study of families whose relatives were moved to the community found that while over half initially strongly opposed movement to the community, 81% agreed with community living once the transition had been completed. Many people who were initially tentative or negative became convinced that community placement was a good idea after seeing their relatives settled in community homes.[20]

Available evidence does not support the concerns voiced by neighbors regarding the establishment of community residential programs.[21] On the contrary, this resistance is usually grounded in the same manifestations of prejudice and xenophobia which previously characterized the exclusion of other minorities. For example, there is the stereotypical fear that people with mental retardation will bring sexual deviance, crime and

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Mentally Retarded Persons in 12 INTERNATIONAL REVIEW OF RESEARCH IN MENTAL RETARDATION 25 (N. Ellis and N. Bray eds. 1984).

[18] O'Connor, *Home is a Good Place: A National Perspective of Community Residential Facilities for Developmentally Disabled Persons* (Monograph No. 2), Washington D.C.: American Association on Mental Deficiency (1976).

[19] Mamula and Newman, *supra* n.17.

[20] Latib, Conroy and Hess, *Family Attitudes Toward Deinstitutionalization*, in 12 INTERNATIONAL REVIEW OF RESEARCH IN MENTAL RETARDATION 67 (N. Ellis and N. Bray eds. 1984).

[21] A New York state study indicated that community resistance derives from fear of decreased property values and fear of people with retardation as violent, dangerous and unfriendly. Both fears were proven to be unfounded. *See Society for Good Will to Retarded Children* v. *Cuomo*, 572 F. Supp. 1300, 1340 (E.D. N.Y. 1983).

violence to the neighborhood.[22] In fact, very few residents are involved in behavioral or criminal incidents. Indeed, people with retardation are more likely to be victims than perpetrators of crime.[23] In general, attitudes toward mentally retarded people living in the community become more positive as other citizens come to know people with retardation.[24]

Another prevalent fear — decreased property values — is not supported by empirical evidence. Despite the frequent protests of some homeowner associations, studies have shown no decreases in property values surrounding homes for people with retardation.[25] Evidence also shows no diminution in the quality of life when a community residence joins a neighborhood.[26]

Nearly half of a national sample identified almost all or most of the mentally retarded as "good neighbors."[27] But despite a Gallup Poll commissioned by the President's Committee on Mental Retardation which found that 85% of the respondents would not object to a home on their block for mildly or moderately retarded persons,[28] substantial discrimination against people with retardation persists. See Amici Curiae Brief of the American Association on Mental Deficiency.

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[22] Okolo and Guskin, *supra* n.17.

[23] *Id.* at 52.

[24] Edgerton, *Failure in Community Adaptation: The Relativity of Assessment*, in ENVIRONMENT AND BEHAVIOR: THE ADAPTATION OF MENTALLY RETARDED PERSONS (Kernan, Begab and Edgerton, eds. 1983).

[25] Okolo and Guskin, *supra* n.17.

[26] *Id.*

[27] Gottwald, PUBLIC AWARENESS ABOUT MENTAL RETARDATION (Arlington, Va: Council on Exceptional Children, 1970).

[28] *President's Committee on Mental Retardation Gallup Poll Shows Attitudes on Mental Retardation Improving*, President's Committee on Mental Retardation Message (Washington, D.C.: April, 1975).

3. The Public Welfare: The Public Treasury.

States have responded to the rising costs of institutional care and the inadequacy of community living options by adopting legislation to mandate the development of community alternatives to institutionalization.[29] For example, the Florida legislature has determined that institutions "are unreasonably costly, are ineffective in bringing the individual client to his or her maximum potential, and are in fact debilitating to a great majority of clients." Fla. Stat. Ann. Sec. 393.062 (West Supp. 1978). In Pennsylvania, the public per capita cost of community living was significantly less than that expended for institutional care for persons with comparable needs (institutional median: $47,000/year; community median: $36,000/year).[30] Program as well as housing costs are less expensive in the community. In 1981-1982, the average Pennsylvania cost per client day in the adult day care program at an institution was $41.51; the average cost per client day for comparable clients in community programs was $28.87.[31]

Although most states began their community programs with their own funds in the early 1970's, three forms of federal assistance have aided the growth of community services: a combination of several distinct federal programs (HUD housing subsidies, SSI for living expenses, Medicaid for medical care), Medicaid reimbursement for intermediate care facilities of fifteen beds or less, and Medicaid funds for small homes through a waiver of certain regulatory requirements.[32]

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[29] *See, e.g.*, Calif. Welf. and Inst. Code 5450 (As amended, 1979) (West); Colo. Rev. Stat. Section 27-10.5-101 (1975); Mass. Gen. Laws Chapter 19. Section 17 (1966) (West); N.Y. Mental Hyg. Law 13.01 (1977) (McKinney); Texas Mental Retardation Persons Act, Tex. Rev. Civ. Stat. Art. 5547-300.

[30] Temple University/HHS Study, *supra* n.9.

[31] *Id.*

[32] Latib, Conroy and Hess, *supra* n.20.

As a result of the skyrocketing costs of institutional care and the economic incentives for community living, reducing the size of residential settings for people with retardation has gained general acceptance amongst most state and local officials.[33] Professor Gunnar Dybwad, a worker and observer of institutions for the last fifty years, concludes, "Whether it is called a state school, a regional center, a training school, or a developmental center, the mental retardation institution typically developed in our country in practically every state over the past 200 years, is dead."[34] "In many states deinstitutionalization is very nearly an accomplished fact. Several, including Maryland, Minnesota, Florida, Michigan, Illinois, and Pennsylvania have closed, or intend to close, public residential facilities to be replaced by community alternatives."[35] By 1982, over 57,000 people nationwide lived in community residences.[36]

The number of people living in retardation institutions has been declining for about twenty years. For fiscal year 1982, the average daily population of the 279 public retardation institutions in the United States was 119,335, down from 189,546 residents of 182 such facilities in 1971.[37] In 1960, the confined population had reached a total of 213,000.[38]

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[33] Kirman, *Some Current Trends*, in 12 MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES, 3 (J. Wortis ed. 1981).

[34] Address by Gunnar Dybwad, *A Society Without Institutions?*, Residential Alternatives Symposium, University of Hartford, at 2 (Dec. 9, 1978).

[35] Craig and McCarver, *supra* n.12 at 99 (note omitted).

[36] Janicki, Mayeda and Epple, *Availability of Group Homes for Persons with Mental Retardation in the United States*, MENTAL RETARDATION 45-51 (1983).

[37] R. Scheerenberger, *Public Residential Services for the Mentally Retarded, 1982* 3-4 (1983).

[38] Nelson & Crocker, *The Medical Care of Mentally Retarded Persons in Public Residential Facilities*, 299 NEW ENG. J. MED. 1039 (1978).

The average population of each institution has similarly declined in the last twenty years from approximately 1500-2000 in 1960 to a little more than 400 today.[39] The rate of institutionalization and the number of people institutionalized have dropped dramatically.[40]

4. The Public Welfare: State Policy.

Most retarded people live among us, their "disability" unnoticed and irrelevant to our social relationships and interaction. Approximately 89% of America's retarded citizens are mildly retarded people who are capable of social and economic self-sufficiency. Moderately retarded people, approximately 6% of the population with retardation, can achieve some social independence and can be economically productive through specialized or competitive employment.[41] Not surprisingly, however, these more recent entrants to the workplace need the special protection of laws prohibiting discrimination on the basis of handicap. *See, e.g.*, 29 U.S.C. Sec. 794; Amendment Article 114 of the Massachusetts Constitution.

It is the remaining 11% — people with severe and profound retardation — that forms the basis for the negative stereotype that all people with retardation are helpless, unfeeling, unaware and unproductive beings, whom some of us are reluctant to embrace as full citizens, friends and family members. These

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[39] Scheerenberger, *supra* n.37; Craig and McCarver, *supra*, n.12.

[40] Craig and McCarver, *supra* n.12. Nearly all Americans with retardation presently reside in the community; only 1.75% of the 6.8 million people with retardation are institutionalized today. Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 RUTGERS L. J. 595, 606 (1983) (calculations based on 1980 census). A table of the number of public retardation institutions, census, and average institutional size from 1890 to 1982 is in Ferleger, *id.*, at 636.

[41] Roos, *Basic Facts About Mental Retardation*, in 1 LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 127, 132 (P. Friedman ed. 1979).

stereotypes are wrong, and like the ones before them which were applied to less fortunate immigrants and people of minority races and religions, these labels are rooted in fear and manifested in unreasoned hostility. Especially in the last twenty years, professionals have documented the tremendous behavioral potential of people with severe and profound retardation and, through the application of basic learning principles, have assisted them to increase self-help, social, academic and vocational skills.[42]

The potential of all people with retardation can be realized from this Court's declaration that, "A court may properly start with the generalization that there is a right to minimally adequate training." *Youngberg* v. *Romeo*, 457 U.S. 307, 319 n.29 (1982). In the case at bar, the parties do not dispute that the potential Cleburne Living Center's residents — and people with retardation generally — are able to benefit from habilitation and community living.[43]

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[42] *See* BEHAVIOR MODIFICATION OF THE MENTALLY RETARDED (T. Thompson & J. Grabowski eds. 1977); S. McClennen, R. Hoekstra & J. Bryan, SOCIAL SKILLS FOR SEVERELY RETARDED ADULTS (1980); Friedman, *Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons*, 17 ARIZ. L. REV. 39 (1975); Whitman & Sciback, *Behavior Modification Research With the Severely and Profoundly Retarded*, in HANDBOOK OF MENTAL DEFICIENCY: PSYCHOLOGICAL THEORY AND RESEARCH (N.R. Ellis ed. 1979).

[43] It is therefore unnecessary for the Court to address again its remark in *dicta* in *Romeo*, that retardation professionals "disagree strongly" about whether all people with severe and profound retardation can receive "effective training", 457 U.S. at 316-317 n.20. Whether correct or not, this statement does not and need not affect state efforts to shift resources from institutional to community services, since there are policy and fiscal reasons, as well as programmatic ones, for ending unnecessary institutionalization. However, the view expressed in footnote 20 does not reflect the state of professional thinking. The studies cited by the Court support provision of habilitation to people with severe and profound retardation and agree that intensive training brings positive results. For a detailed discussion of footnote 20, the studies cited therein, and the consequences of the argument, *see* Ferleger, *supra* at 628-632, 634.

The social policy benefits of community living have another dimension: protection of the fundamental rights of people with retardation. R. Scheerenberger, *A History of Mental Retardation* 252-253 (1983). Federal constitutional law supports state attempts to protect people with retardation from harm by not needlessly institutionalizing them.[44] A growing number of courts have found that large institutions for people with retardation must be supplemented and/or replaced with community care because institutions result in unconstitutional confinement and other harms. Over the past thirteen years, litigation has proceeded in almost every state seeking appropriate alternatives to institutional care for people with retardation.[45]

B. *People With Retardation in Large Institutions.*

While nearly all people with retardation are already living among us in our neighborhoods and sharing the benefits and burdens of the community, a small minority continue to receive unnecessary and ineffective care in large institutions. It is necessary, in Amici's view, to understand the deficiencies of those institutions in order to further appreciate the value of the community opportunities described above which the City Council seeks to deny to the proposed residents of the CLC home.

Institutions have typically been a last resort, utilized only in the absence of alternatives. Prior to the twentieth century, families had few options for taking care of their own mentally retarded relatives. For many years in some parts of the United States, large public institutions provided the only alternative

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[44] *Youngberg* v. *Romeo*, *supra*; *Parham* v. *J.R.*, 422 U.S. 584, 600 (1979) ("substantial liberty interest in not being confined unnecessarily for medical treatment").

[45] *See, e.g.*, Herr, *RIGHTS AND ADVOCACY FOR RETARDED PEOPLE* (1983), for a discussion of this litigation.

for an average income family faced with the need to care for a retarded relative outside the home.[46]

Conditions at some institutions have improved in the wake of mounting family, judicial and legislative pressures, but serious problems still persist. Despite weak attempts to gain legitimacy as a provider of custodial care to the people with retardation, the image of institutions has been tarnished by public investigation, scholarly studies, and judicial findings.[47] The dehumanization and damaging consequences of institutionalization are now widely known and accepted.[48]

The death rate in institutions is unusually high.[49] Neglect and epidemic disease contribute to diminished life expectancy, failure to correct orthopedic abnormalities renders residents

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[46] Craig and McCarver, *supra* n.12; Craig and McCarver, *Placement of the Retarded in the Community: Prognosis and Outcome* in 7 INTERNATIONAL REV. OF RESEARCH IN MENTAL RETARDATION (N. Ellis ed. 1974).

[47] Taylor & Bogdan, *Defending Illusions: The Institution's Struggle for Survival*, 39 HUM. ORGANIZATION 209, 211 (1980).

[48] *See* I. Belknap, HUMAN PROBLEMS OF STATE MENTAL HOSPITALS (1956); B. Braginsky & D. Braginsky, HANSELS & GRETELS (1975); R. Edgerton, THE CLOAK OF COMPETENCE (1967); R. King, N. Raynes & J. Tizard, PATTERNS OF RESIDENTIAL CARE: SOCIOLOGICAL STUDIES IN INSTITUTIONS FOR HANDICAPPED CHILDREN (1971); J. Tizard, THE ROLE OF SOCIAL INSTITUTIONS IN THE CAUSATION, PREVENTION, AND ALLEVIATION OF MENTAL RETARDATION 281 (1970); D. Vail, DEHUMANIZATION AND THE INSTITUTIONAL CAREER (1966); McCormick, Balla & Zigler, *Resident-Care Practices in Institutions for Retarded Persons: A Cross-Institutional, Cross Cultural Study*, 80 AM. J. MENTAL DEFICIENCY 1 (1975); Wing, *Institutionalism in Mental Hospitals*, 1 BRIT. J. SOC. & CLINICAL PSYCHOLOGY 38 (1962).

[49] *See, e.g.*, Balakrishnan & Wolf, *Life Expectancy of Mentally Retarded Persons in Canadian Institutions*, 80 AM. J. MENTAL DEFICIENCY 650 (1976) (mortality rate double that of general population); Forssman & Akesson, *Mortality of the Mentally Deficient: A Study of 12,903 Institutionalized Subjects*, 14 J. MENTAL DEFICIENCY RESEARCH 276 (1970); Tarjan, *Natural History of Mental Retardation in a State Hospital Revisited: Releases and Deaths in Two Admission Groups, Ten Years Apart*, 117 AM. J. DISEASES CHILDREN 609 (1969).

less functional, poor dental care causes loss of teeth,[50] and the misuse of drugs results in permanent disease.[51]

The CLC home is to be part of the State of Texas' effort to meet its obligations under state and constitutional law to protect institutional residents from harm. This Court need not decide here the extent of those obligations; that issue is not raised. However, Amici urge the Court to accord appropriate deference to the judgment of retardation professionals and the State's policy favoring community living, especially where that judgment and practical experience has firmly supported that policy for decades.

III. People With Retardation, Like Other Minorities Before Them, Cannot be Excluded from our Neighborhoods Nor Denied Equal Opportunities in Our Communities.

The professional consensus supporting habilitation in small community settings is rapidly being translated into a reality for persons with retardation. In the great majority of communities throughout the country, the movement of people with retardation from antiquated state institutions to homelike community settings has been well received by local neighbors.

But the transition has not been without difficulties in many localities. Like other minorities and immigrants before them, people with disabilities occasionally face irrational fears and hostile discrimination by resistant neighbors. The historical pattern of established communities refusing to admit the next generation of new citizens has repeated itself in some towns

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[50] Nelson & Crocker, *supra* n.38.

[51] *See generally* Plotkin & Gill, *Invisible Manacles: Drugging Mentally Retarded People*, 31 STAN. L. REV. 637 (1979).

where public meetings can become open forums for prejudice and hatred.

Where prejudice and discrimination prevent *any* class of people from becoming our new neighbors, fundamental rights are customarily at stake. The situation is no different when people with retardation move to new homes. For individuals already living outside of institutions, the effect of this discrimination is an abridgement of their rights to travel and association. For people confined to institutions who are eager to leave, and for whom professional judgment mandates a move, the effect also involves continued unnecessary deprivation of liberty, privacy, property, and dignity. And for all citizens who are precluded from residing in a place of their choice solely by reason of a characteristic imposed at birth, the right to be free from arbitrary and stigmatizing restrictions is involved. Irrational barriers which deny individuals with retardation the same opportunities as are available to all other persons must be struck down under the Equal Protection Clause. Such barriers also contravene the fundamental rights recognized by international declarations of the United Nations and other standard setting bodies.

It is not new for public officials to use delegated authority to frustrate the exercise of these rights by minority groups. While this country has a long history of such discrimination against various insular minorities, it also has a long tradition of evoking special protections to combat such attitudes. Public actions grounded in prejudice have been rebuked by the Court in a number of areas such as housing patterns, employment decisions, educational assignments, and electoral apportionment. Obstacles such as zoning codes that restrict the exercise of fundamental rights of retarded persons should be subjected to the same scrutiny.

That people with retardation, like other unfavored minorities before them, may be excluded from neighborhoods because of

their *class characteristics* does not mean their *individual* situations need be ignored. The defect in discrimination such as that practiced in the City of Cleburne is that, without any consideration of the individuals involved, the City excludes a minority class of people, based on immutable characteristics and motivated by false and derogatory stereotypes.

Handicapped citizens may be born with different degrees of retardation just as people of color may be black or near white. The question of discrimination does not turn on the shade of an individual's skin or his or her IQ score, but rather on whether the public action preventing a group of people from living in the neighborhood of their choice is directed at a class that is fully entitled to equality under the law and for whom class based distinctions are not reflective of their true capacities and individuality.

Similarly, that the Congress or state legislatures have recognized the historical pattern of prejudice and reacted with special benefits or protections does not unduly complicate the invocation of heightened scrutiny to discriminatory actions. Legislative proscriptions against discrimination in the areas of employment, education, housing, and public accommodation, for example, as well as similar special benefit programs for many minority groups, have never been a justification for dispensing with the special role of equal protection guarantees.

Most people with retardation are already living next door with dignity and acceptance. For the remaining members of their class, we can ill afford — nor will the Constitution permit — prejudice and hostility to exclude them from our neighborhoods. Paternalistic excuses about special needs cannot obscure the separate and unequal treatment historically imposed on people with retardation, and the suspect motivation of restrictions on their fundamental freedoms.

Conclusion

For the reasons set forth above, Amici urge the Court to dismiss the writ of certiorari as improvidently granted, or if it chooses to reach the merits, to affirm the decision of the Court of Appeals for the Fifth Circuit.

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